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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re FTL Systems, Inc.

Serial No. 75/729,408

William J. Ryan of Dunlap & Seeger, P.A. for FTL Systems,
Inc.

David H. Stine, Trademark Examining Attorney, Law Office
114 (Margaret Le, Managing Attorney)

Before Seeherman, Hairston and Bucher, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

FTL Systems, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register THE BILLION GATE DESIGN SOLUTION as a trademark for "computer software for compilation and simulation of electronic and electro-mechanical designs."¹ Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C.

¹ Application Serial No. 75/729,408, filed June 16, 1999, and asserting a bona fide intention to use the mark in commerce.

1052(e)(1), on the ground that applicant's mark is merely descriptive of its identified goods.

Applicant and the Examining Attorney have filed appeal briefs. An oral hearing was not requested.

We affirm the refusal.

A mark is merely descriptive, and therefore prohibited from registration by Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of a quality, characteristic, function, ingredient, attribute or feature of the goods or services with which it is used. See **In re Gyulay**, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); **In re Venture Lending Associates**, 226 USPQ 285 (TTAB 1985).

The question of whether a term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the significance that the mark is likely to have, because of the manner in which it is used, to the average purchaser as he encounters goods bearing the mark in the marketplace. **In re Engineering Systems Corp.**, 2 USPQ 1075 (TTAB 1986).

The examination history of this application has a bearing on the Examining Attorney's determination that the mark is merely descriptive. In the first Office action the Examining Attorney required a disclaimer only of the words

DESIGN SOLUTION because they were found to be merely descriptive. Applicant was also required to submit samples of promotional material for its goods, and to explain whether "billion gate" has any significance in the trade. In response to that action, applicant offered the required disclaimer, and explained that "GATE is a term in the industry used as a unit of measure to describe the capacity of an electronic or electro-mechanical system." Response filed June 12, 2000. With that response applicant submitted the requested materials, and it is on the basis of those materials, as well as applicant's information as to the meaning of "gate," that the Examining Attorney then refused registration on the ground that the mark as a whole is merely descriptive.

We thus turn to this material, as well as applicant's explanation of its goods:

The purpose of the software is to simulate and predict the performance of complex electronic and electro-mechanical "designs" or systems. Examples of such electronic designs are as diverse as aircraft and spacecraft electronics, telephone switching systems and medical diagnostic equipment. Examples of such electro-mechanical designs are flight controls and engine controls. In use, the software creates a model of the particular design, simulates its operation under the intended circumstances of its use and predicts

its performance under those circumstances. The advantage of the goods is that they are able to simulate and predict the performance of a particular design without having to actually construct and operate the design. Response filed June 28, 2001.

This explanation, as well as applicant's disclaimer of the term DESIGN SOLUTION, clearly shows that DESIGN SOLUTION is a merely descriptive term for applicant's goods.

The promotional materials submitted by applicant include the following statements:

Subhead: Breakthrough in VHDL and VHDL-AMS Simulation Technology
Auriga™, The Billion Gate Design Solution

A technology breakthrough allows designers to compile and simulate VHDL and VHDL-AMS designs from 10M through 1 billion gate equivalents. FTL System's Auriga™ divides compilation and simulation of VHDL and VHDL-AMS (analog and mixed signal) across shared memory multiprocessors and massively parallel systems with single processor or shared memory nodes. This technology breakthrough increases design verification capacity at least two orders of magnitude relative to prior simulators.
Applicant's press release, June 11, 1998

Touted as The Billion Gate Design Solution™, FTL's Auriga™ offers exceptional performance for developers of large applications that run on

multiple processor hardware designs, such as jet aircraft, automobiles and process control systems. For these types of systems, as the number and complexity of processors increases so does the number of "gates," which are the fundamental building blocks of microelectronic circuitry. When the number of gates move into the one billion region, FTL's Auriga performs in a class by itself. Auriga excels at handling software designs that operate hardware systems that are 100 times "larger" than competing solutions.

Before Auriga, compilation tools were painfully inadequate for designers building systems with 10 million gate equivalents or more.

Before Auriga, system designers had three less effective options: simulate at several levels of detail, use large and expensive hardware emulation engines or use actual hardware prototypes. All alternatives are still limited to about 20 million gate equivalents.

The most formidable challenges facing FTL designers were increasing gate capacity exponentially, distributing complex computing tasks among various processors and reducing network latency. FTL addressed these challenges by designing EDA tools implemented with advanced object-oriented technology to substantially raise gate capacity and increase simulation speed.

Sun Microsystems, material on Large Scale Co-Design of Hardware/Software Systems (according to the material, applicant developed its software using Sun technology and equipment)

In another piece of promotional literature, applicant touts as a unique feature of its compiler /simulator "Extended capacity for billion-gate equivalent designs."

In view of this evidence, it is clear that BILLION GATE identifies a characteristic of applicant's software, namely, the capacity of the software to handle billion-gate equivalent designs. Further, when the terms BILLION GATE and DESIGN SOLUTION are combined as THE BILLION GATE DESIGN SOLUTION, the resulting mark is merely descriptive. The relevant purchasers for software for compilation and simulation of electronic and electro-mechanical designs would immediately understand, when the mark is used in connection with these goods, that the software provides a solution for consumers building software designs with one billion gates.

Applicant argues that a potential purchaser would not understand from the mark what the function of the software is, noting that the word SOLUTION connotes either a liquid mixture or the manner in which to resolve a problem. However, this argument suggests that the mark should be viewed in the abstract and, as noted above, the question of whether a term is merely descriptive must be determined in relation to the identified goods. Thus, the fact that the individual words in applicant's mark may have other

meanings in other contexts does not affect our decision herein.

Applicant also argues that the mark cannot be merely descriptive because "computer programs for use in billion gate-equivalent designs" would not be an acceptable identification, but would be rejected as indefinite. At the same time, applicant acknowledges that "extended capacity for billion gate-equivalent designs" is an appropriate "designation of the field of use of the goods." Whether or not the identification suggested by applicant in this argument would be deemed acceptable is beside the point.² Applicant has pointed to no case law that requires, in order for a mark to be found merely descriptive, that it would be acceptable as an identification of goods. What is relevant is applicant's statement that "billion gate-equivalent designs" describes the field of use of applicant's goods. This lends further support to our view that consumers in this field would immediately recognize THE BILLION GATE DESIGN SOLUTION as describing a feature of the software.

Decision: The refusal of registration is affirmed.

² We make no comment on the acceptability of applicant's hypothetical identification of goods. Such an identification was never offered, and there has been no statement by the Examining Attorney as to its acceptability. Applicant's entire argument is based on its own supposition.